

OPINION OF THE COURT OF APPEALS
FOR THE SECOND SUPREME JUDICIAL DISTRICT
OF TEXAS

EX PARTE ORISON F. McDONALD, II

Relator

and

HERBERT DARPELL BOMAR

Relator

631 S.W.2d 221

On the 31st day of March, 1981, appellants were arrested on fugitive warrants based upon complaints filed in the State of Minnesota. An initial Writ of Habeas Corpus was filed on behalf of each appellant in No. 116,534-B. On the 16th day of October, 1981, Governor's warrants were handed down by the Governor of the State of Texas for extradition of the appellants to the State of Minnesota. On October 23, 1981, appellants were arrested and a Petition for Writ of Habeas Corpus was

filed on behalf of appellant McDonald as No. 117,895-B and on behalf of appellant Bomar as No. 117,896-B in the 78th District Court of Wichita County, Texas. The Court consolidated such writs as No. 117,896-B. A hearing thereon was held the 11th day of December, 1981, and the trial court entered its judgment on the 11th day of January, 1982. In that judgment, the trial court denied the habeas corpus relief sought by the appellants and ordered them extradited to the State of Minnesota. From this extradition judgment, these appeals have been taken.

We affirm the judgment of the trial court.

By their grounds of error numbered 1, 2, 3, 4, and 13, appellants complain

that the trial court erred in denying habeas corpus relief and ordering extradition in light of evidence adduced which they contend shows that extradition was brought to aid the enforcement of a private claim, the collection of a debt, the gratification of personal malice and/or for purely private interests.

At the threshold, we note that the United States Supreme Court in Michigan v. Doran, 439, U.S. 282 (1978), at page 289, held that:

Once the governor has granted extradition, a court considering release on habeas corpus can do no more than decide (a) whether the extradition documents on their face are in order; (b) whether the petitioner has been

charged with a crime in the demanding state; (c) whether the petitioner is the person named in the request for extradition; and (d) whether the petitioner is a fugitive.

We are constrained to hold that this holding circumscribes and limits our scope of review. The case of Ex parte Hatfield, 235 S.W. 591 (Tex. Crim. App. 1921) stands for the proposition that inquiry into the motive for extradition proceeding cannot be considered. Nevertheless, later cases indicate that inquiry into the motive for extradition proceedings is permitted in a habeas corpus proceeding attacking extradition. Ex parte Seffens, 376 S.W.2d 348 (Tex. Crim. App. 1964) and Ex parte Bradley, 456 S.W.2d 370 (Tex.

Crim. App. 1970). We are not directed to any cases, and indeed we find none, decided subsequent to Michigan v. Doran, supra, that would permit inquiry into the motive for the extradition proceedings. Grounds of error 1, 2, 3, 4, and 13 are overruled.

By grounds of error numbered 5 and 12, appellants complain that the trial court erred in denying habeas corpus relief for the reason that they were denied a speedy trial on the extradition request. Again we are not directed to any cases holding that Texas Speedy Trial Act is applicable to extradition proceedings. We feel justified in holding that the Act is not applicable. Cf. Gill v. State, 593 S.W.2d 697 (Tex.

Crim. App. 1980). Grounds of error 5 and 12 are overruled.

By ground of error number 6, appellants urge that the trial court erred in denying habeas corpus relief because "the Governor's warrant and the documents supporting the Governor's warrant were insufficient on their face to establish that a judicial determination of probable cause was made in Minnesota." We disagree.

The documents relating to extradition are to be found in State's Exhibits, RES-1 (relating to Bomar) and RES-2 (relating to McDonald). Each contains a "complaint" signed by one Gary A. LaVasseur charging the appellants with one or more offenses of securities violations under the laws of

Minnesota. Each complaint is seven pages in length, signed before a magistrate of the State of Minnesota. One page seven of each "complaint", the Minnesota magistrate makes a finding of probable cause. Ground of error number 6 is overruled.

By ground of error number seven, appellants urge that the trial court erred in refusing to grant habeas corpus relief because the "complaint" on which the extradition proceedings are brought are based on the complaintant's information and belief. This is sufficient. Ex parte Harris, 389 S.W.2d 668 (Tex. Crim. App. 1965). Ground of error number 7 is overruled.

By ground of error number eight, appellants urge that the trial court

erred in denying habeas corpus relief and in ordering extradition because the State failed to identify the appellants as the persons sought for extradition by the demanding state.

The learned trial judge in his judgment entered on January 11, 1982, held:

The Court then considered the relator's motion to quash the Governor's warrant for reason of improper identity, and having considered the evidence finds the relators herein are duly and properly identified both by name or idem sonans and by pictures in the accompanying papers with such warrant and by relators' own testimony, and such motion is hereby denied.

We hold that the record, as a whole, which we have carefully reviewed, supports these findings of the trial court relative to identity. Ground of error number eight is overruled.

In their ground of error number nine, appellants contend that the trial court erred in denying appellants' Special Plea in Bar because extradition of the appellants would constitute "double jeopardy". We disagree. There can be no jeopardy in a criminal action until a jury is empaneled and sworn.

Crist v. Bretz, 437 U.S. 28 (1978).

This has not occurred in either Texas or Minnesota. Ground of error number nine is overruled.

By ground of error number ten, appellants contend that the trial court

erred in refusing to admit into evidence and in sustaining a State's objection to a tape recording (and/or transcript thereof) of appellant Bomar's conversation with one Lee Heutmaker in support of their "private claims" motions. Our discussion and holding on grounds of error numbers 1, 2, 3, 4, and 13 dispose of this ground of error, which is overruled.

In their ground of error number 11, appellants contend that the trial court erred in granting extradition and in denying habeas corpus relief in that appellants were restrained of their liberty from March 13, 1981, until August 31, 1981, on the "basis of a fugitive warrant and no Governor's warrant. . . ." Again we are referred to

no case law relative to this issue. However, the record does not reflect that either appellant was "restrained of his liberty". Ground of error number eleven is overruled.

Finally, appellants urge the trial court erred in admitting the Governor's warrant and its supporting documents "because they were insufficient as a matter of form substance to contain the necessary requisites to sustain" the appellants' extradition.

V.A.C.C.P. art. 51.13, Sec. 3, provides in pertinent part:

No demand for extradition of a person charged with crime in another State shall be recognized by the Governor unless in writing . . . and accompanied . . . by a copy of an affidavit

before a magistrate there, together with a copy of any warrant which issued thereupon . . .

We have discussed generally, the documents relative to extradition under ground of error number six above. The main document which we referred to as "complaint", signed before a Minnesota magistrate, is an affidavit and it contains a warrant issued thereupon signed by such magistrate. Ground of error number fourteen is overruled.

The judgment of the trial court is affirmed.

OPINION OF THE 78TH DISTRICT COURT
OF WICHITA COUNTY, TEXAS

EX PARTE:)
ORISON F. McDONALD, II,)
ET AL)

On this the 11th day of December, 1981, came on to be heard the Writ of Habeas Corpus heretofore filed herein by Petitioners Orison Fleming McDonald, II, aka Orison F. "Mack" McDonald, II and Herbert Darrell Bomar, aka Darrell H. Bomar, Relators.

The State of Texas was duly represented by and through District Attorney's Office of Wichita County, Texas, with such representation being furnished by District Attorney Timothy D. Eyssen and Petitioners were duly represented by the Honorable Perry Wesbrooks and the Honorable Greg Merkle.

The Court having previously considered motions to consolidate entered an order that Causes 116,534-B, 117,895-B, and 117,896-B be duly consolidated with the surviving cause being Cause No. 117,896-B to be entitled Ex Parte: Orison Fleming McDonald, II, et al.

The Court heard relators' motions for discovery, duly ruled on same.

The Court then considered relators' motion to quash the Governor's warrant for lack of probable cause, and finds that full faith and credit should be given to the demanding state's criminal action, and such motion is hereby denied.

The Court further considered relators' motion to quash the warrant

for lack of information and belief, and finds that full faith and credit should be given duly issued information in accordance with the laws of the demanding state, and such motion is hereby denied.

The Court then considered the relators' motion to quash the Governor's warrant for reason of improper identity, and having considered the evidence finds the relators herein are duly and properly identified both by name or idem sonans and by pictures in the accompanying papers with such warrant any by relators' own testimony, and such motion is hereby granted.

The Court then considered the motion of relators to quash the warrant by virtue of constitutional grounds,

both within the Constitution of the United States of America and the State of Texas, and finds that such constitutional grounds as alleged have not been violated but have been handled in compliance with with requirements of such clauses, and such motion is hereby denied.

The Court then considered the relators' motion to dismiss the extradition by virtue of the reason that the relators were in a Chapter 11 bankruptcy, and the Court duly finds therein that a Chapter 11 bankruptcy is a civil proceeding and further finds that no instruction or order has been issued by the Bankruptcy Courts of the Northern District of Texas or by the Bankruptcy Courts of the State of

Minnesota wherein certain adversary civil litigation filed in such bankruptcy has been duly transferred by the U.S. Bankruptcy Court, Northern District of Texas.

The Court further finds that the extradition clause of the Constitution of the United States provides for and governs the action of not only the state executive but those of the courts of the asylum state, and that such motion is hereby denied for lack of jurisdiction over bankruptcy matters.

The Court jointly considered relators' special pleas in bar and motion to dismiss by virtue of failure to be tendered a speedy trial and finds that a speedy trial is a speedy trial upon the actual criminal cause therein

and not as to extradition, and hereby denies such motion.

The Court further considered relators' motion to quash the extradition warrant by virtue of the fact that the same was issued on private claims and in conjunction therewith finds that although relators' private claim evidence was uncontroverted, the demanding state has certified that no action is being had by virtue of a private claim, and that the Governor of this state duly considered the issue of private claims which was denied by the Governor, and the Court therefore finds that such motion to quash is hereby denied.

The Court, having denied the various motions to quash, finds that the

Governor's warrants issued for relators herein are regular on their face, sufficient in form and contain the necessary requisites to sustain the extradition of the relators. In connection herewith, the Court finds that the Governor's warrants duly issued by the Governor of the State of Texas are supported by the introduced documents from the demanding state, the State of Minnesota, and the same has been properly attested to in form sufficient to meet the requirements of the Uniform Extradition Act as well as the demanding state, the State of Minnesota.

The Court further finds that the Petitioners, relators herein, have been duly charged with a crime as the same is

provided for in the Statutes of the demanding state, the State of Minnesota.

The Court further finds that Petitioners, relators, are fugitives from the demanding state, the State of Minnesota.

Wherefore, premises considered, this Court finds the Petitioners, relators herein, should be remanded to the State of Minnesota pursuant to that state's requisition, and that said Petitioners, relators, are hereby remanded to the Sheriff of Wichita County, Texas, to be incarcerated until the proper authorities from the demanding state, the State of Minnesota, can return said Petitioners, relators, to the State of Minnesota, and the Sheriff is hereby ordered following

completion by relators of appeals, if any, to notify the State of Minnesota and said Petitioners may be released to said Minnesota authorities.

The Court further sets bonds for appeal in this matter at \$7,500.00 for each of the relators herein pending any appeals by relators to the Texas or Federal Appellate Courts having jurisdiction.

Entered this 11th day of January, 1982.